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Supreme Court of the United States

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October Term, 1972

No. .....

72-916

JAMES LEE STOCKWELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

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JAMES LEE STOCKWELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, James Lee Stockwell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit entered in this proceeding on November 22, 1972.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported,

appears in the Appendix hereto. No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 22, 1972. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 22 (2).

QUESTIONS PRESENTED

1. **Whether the trial court erred in admitting in evidence petitioner's extrajudicial admissions in the absence of substantial and independent corroborating proof of the corpus delicti of the crime of mail fraud.**

2. **Whether petitioner was denied due process of law under the Fifth Amendment to the United States Constitution by the trial court's admission in evidence of the extrajudicial and in-court identifications of petitioner by a material prosecution witness, Vincent Giamformaggio.**

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

A 20-count indictment charged petitioner with mail fraud in applying for credit cards by submitting false information (18 U.S.C. § 1341) and using false names for the purpose of executing the alleged scheme to defraud. (18 U.S.C. § 1342.) (C.T.[1] 1-22.) Petitioner was convicted on all counts and was sentenced to three years in prison on each count, the sentences to run concurrently. (C.T. 63.)

The evidence showed that petitioner met Thomas Polich in 1966 when petitioner was the manager and part owner of a health club. (R.T. 17.) In 1967 petitioner and Polich decided to go into business together. They planned to open either a health club, a family billiards parlor, or a bar. (R.T. 37.) They acquired a building in Los Angeles (R.T. 37) and filed, recorded and published a certificate of doing business under the fictitious name of Sunset Spa. (Ex. 50, A; R.T. 25-6, 175.)

In July, 1967, Polich signed a general power of attorney giving petitioner broad authority to use Polich's name to borrow money and perform any act necessary to promote the business. (Ex. 51; R.T. 17-18.) Although Polich and petitioner did not specifically discuss applications for credit cards, Polich testified that he authorized petitioner "to use other credit information of [Polich] in connection with credit applications in [Polich's] name," to obtain "whatever was needed for opening up the business," to "make the applications and get the credit set up" (R.T. 21), and to borrow money in Polich's name. (R.T. 39.)

Petitioner applied for and received a number of credit

---

[1] As used herein "C.T." refers to the Clerk's Transcript, "R.T." to the Reporter's Transcript.

cards (Ex. 1-58.) With credit cards he made purchases of television sets, radios, liquor (R.T. 52-6), clothes (R.T. 60), and paid for Palm Springs hotel accommodations for himself and several of his associates and their wives. (R.T. 61-3.) These purchases were consistent with the opening and operation of the health club business. Polich, a government witness who was deeply involved with petitioner in the business but was not prosecuted, testified that petitioner said they "had to continue and get this thing going to get the doors of this business opened, so that we could get these cards paid off." (R.T. 28, 51.) Petitioner and Polich did try to start the business (R.T. 37), and even acquired a building on Sunset Boulevard in Los Angeles, named it the "Sunset Spa", and furnished it with gym equipment. (R.T. 64-5, 76-7.) However, the business did not succeed and petitioner did not pay for many of the purchases he had made.

On some credit card applications petitioner overstated his income at a former place of employment. (R.T. 146-7.) Petitioner worked on a commission basis, and the statement could well have been a projected estimate. In one application petitioner incorrectly stated that James Raquene, the name used by petitioner, was the brother of Polich. (R.T. 192.) This statement was in no way material to the extension of credit. There were no other incorrect statements made in the applications. The applications containing these statements formed the basis for only 10 of the 20 counts.

Petitioner applied for some of the credit cards under the names James Raquene, James Casino, and Thomas Polich. The power of attorney gave him the right to use Polich's name. (Ex. 51.) He published his use of the other

names (R.T. 201-3) and obtained driver's licenses in these names, always under the same license number. (R.T. 200, 203; Ex. C.) Thus, the California Department of Motor Vehicles, a primary source of information to which creditors resort, had a complete record showing that petitioner was using these names. This evidence supported petitioner's contention that he did not use different names with the intent to commit a fraud as required by 18 U.S.C. § 1342.

The above evidence was consistent with petitioner's innocence of mail fraud and with petitioner's contention that he had intended to pay for the goods acquired but was unable to do so because his business failed. The alleged scheme to defraud was principally shown by evidence of extra-judicial admissions allegedly made by petitioner, as follows:

(1) Donna Morrell, whose husband was associated with petitioner and used some of the credit cards, and who herself asked to use the cards, testified that during the Palm Springs trip mentioned above, petitioner said one of his credit cards was "hot" because there was an amount owing on it and that he wanted to obtain more cards because the others were "used up" and he was afraid to use them any more. (R.T. 61-4.)

(2) Mrs. Morrell testified that in January, 1968, when petitioner wanted to take back a car he had provided for her, she threatened to go to the police and tell them about the "credit card fraud" and petitioner told her that if she cared about her children or herself she would go home and keep her mouth shut or he would shut it for her. (R.T. 65-6.)

(3) Lloyd Stewart, a gasoline service station operator, testified that petitioner said he did not like large companies, wanted to "leech" them, and intended to use credit cards

and not to pay for the merchandise obtained. (R.T. 155-6.)

(4) Vincent Giamformaggio, another gas station operator, testified that petitioner said he had " 'taken' Master Charge for $30,000.00 plus " (R.T. 89.)

(5) Susan Morris, who admitted that she arranged to meet petitioner and asked him if he would allow her to use his credit cards (R.T. 133-4), testified that petitioner told her he had "taken" Master Charge and Carte Blanche in the past. (R.T. 143.)

(6) Postal Inspector William Collier testified that he questioned petitioner and that petitioner gave evasive statements regarding his previous employment and other information. (R.T. 173.)

Vincent Giamformaggio testified that petitioner came into his gas station on three occasions in the latter part of 1968 and asked Giamformaggio to stamp petitioner's credit card indicating the purchase of certain goods but to give petitioner cash instead of the goods. In return, petitioner would "kick back" a percentage of the cash to Giamformaggio. (R.T. 86-8.) On an unspecified later date, a representative of Texaco, who had formerly been an F.B.I. agent, questioned Giamformaggio about the transaction and showed Giamformaggio eight pictures. Two of the pictures were of petitioner. There was only one picture of each of the other persons. The others looked nothing like petitioner. Giamformaggio selected petitioner's two pictures and said petitioner was the man who had been in the gas station. (Ex. B, R.T. 97, 102-3, 186.) In April, 1972, a Deputy United States Attorney and Postal Inspector William Collier showed Giamformaggio the same group of eight pictures, again consisting of two pictures of petitioner and only one of everyone else. Giamformaggio

again identified petitioner (R.T. 98-100.) Giamformaggio identified petitioner in court and stated his conclusion that he would have been able to identify petitioner in court even if he had not previously been shown the pictures. (R.T. 184.) The pictures were received in evidence over petitioner's objection and motion to strike on the ground that the pictures were unduly suggestive of petitioner as the suspect and that the extrajudicial identification tainted the courtroom identification. (R.T. 194.)

REASONS FOR GRANTING THE WRIT

1. The Trial Court Erroneously Failed To Apply The Rule Requiring That Petitioner's Extrajudicial Admissions Be Corroborated By Substantial, Independent Evidence Of The Corpus Delicti Of The Charged Crimes.

Counsel for petitioner asked the trial court to apply the federal rule (see *Smith v. United States*, 348 U.S. 147, 152-3, 75 S. Ct. 194, 197-8, 99 L. Ed. 192, 198 (1954)) requiring independent, substantial corroboration of petitioner's extrajudicial statements set forth above. Counsel argued that there was insufficient corroborative evidence. (R.T. 191-3.) The record indicates that the court did not apply the corpus delicti rule. (R.T. 193.)

In probably a majority of criminal cases the existence of the corpus delicti is not disputed. In such cases, there is no question that a crime was committed. Typically, the principal issue is whether the defendant was the perpetrator. In the present case, however, the sole question is whether the crime

of mail fraud was committed. The identity of petitioner as the person who applied for and used the credit cards was not challenged. The question is whether petitioner did so with the intent and pursuant to a scheme to defraud.

Because the only disputed factual issue is the existence of the corpus delicti, the application of the proper standard requiring corroboration of the corpus delicti becomes critical. Because the standard was not applied, there is a great likelihood that petitioner was convicted solely on the basis of his extrajudicial admissions. We do not know and the record does not disclose whether the trial court failed to apply the rule because it erroneously believed the rule did not apply where the statements are made to private persons rather than government agents, or for some other reason. The important point is that the rule was not applied in a case where its application was essential to a proper result.

The corpus delicti rule generally permits use of the accused's uncorroborated admissions to identify him as the criminal once the corpus delicti has been corroborated by evidence independent of the accused's statements. However, in *Smith v. United States*, 348 U.S. 147, 75 S. Ct. 194, 99 L. Ed. 192 (1954), this Court held that the corpus delicti rule applies to a crime (there income tax evasion) involving no "tangible corpus delicti" even though it is impossible to prove the existence of the crime without identifying the criminal. The Court refused to limit the reach of the rule:

> "As to this crime, it cannot be shown that the crime has been committed without identifying the accused. Thus we are faced with the choice either of applying the corroboration rule to this offense and according the accused even greater

> protection than the rule affords to a defendant in a homicide prosecution [citations omitted], or of finding the rule wholly inapplicable because of the nature of the offense, stripping the accused of this guarantee altogether. We choose to apply the rule, with its broader guarantee, to crimes in which there is no tangible corpus delicti, where the corroborative evidence must implicate the accused in order to show that a crime has been committed." (348 U.S. at 154, 75 S. Ct. at 198, 99 L. Ed. at 199.)

United States v. Bukowski, 435 F. 2d 1094 (7th Cir. 1970), held that the corpus delicti rule requires corroboration of the admissions made to private persons, before an investigation has even commenced, as well as to government agents investigating a crime. Bukowski, a juror in a previously-tried fraud case, was convicted of contempt of a trial court order forbidding jurors from discussing or reading about the case on trial. In the later contempt prosecution a newspaper reporter testified that Bukowski admitted that he had read magazine articles relating to the fraud case and had discussed the articles with other jurors in that case. Holding the corpus delicti rule applicable to these admissions, although they were made to a private citizen, the Court of Appeals reasoned:

> "The fundamental requirement of corroboration should also apply whether the statements of the accused have allegedly been made to investigating officials or private citizens. The Supreme Court has chosen to give broad scope to both the function and usage of the rule [citations omitted] and the considerations underlying the requirement

are apparent even where the recipient is a private individual" (435 F 2d at 1106)

The *Bukowski* decision that the rule applies to statements made to private citizens follows the general rule (*Developments In The Law - Confessions*, 79 HARV L REV. 935, 1079 (1966)) and has a sound logical basis. The rule is intended to prevent "errors in convictions based upon untrue confessions alone." (*Warszower v. United States*, 312 U.S. 342, 347, 61 S Ct 603, 85 L Ed 876 (1941).) Admissions made to the police may be unreliable because they may be the product of coercion, fear, or other questionable motives. But admissions made to private citizens may be even less trustworthy, for different reasons:

(1) A statement admitting the commission of a crime is far more likely to be motivated by mere braggadocio when made to a private citizen than when made to a policeman;

(2) Such statements are particularly suspect when related by a private citizen who may himself be deeply implicated in the alleged crime and therefore has a strong incentive to please the authorities. That is the case here. Susan Morris tried to induce petitioner to permit her to use his credit cards. (R.T. 133-4.) Donna Morrell's husband was associated with petitioner in his ventures. (R.T. 61-4.) Lloyd Stewart and Vincent Giamformaggio, the two gas station operators, were allegedly asked by petitioner to honor his credit cards and give him cash instead of merchandise in return for a percentage of the cash. (R.T. 86-8, 155-6.) The record does not show whether or not they accepted the alleged offer.

(3) The private citizen, an untrained listener, is more likely than a trained police officer to inaccurately report

what he heard. (*Developments In The Law - Confessions*, 79 HARV. L. REV. 935, 1079 (1966).)

The corpus delicti rule is a standard measuring the sufficiency of evidence necessary to convict, rather than the admissibility of incriminating statements. (*United States v. Bukowski*, 435 F.2d 1094, 1105-6, n. 7 (7th Cir. 1970).) It "may be considered a facet of proof beyond reasonable doubt in federal courts." (*United States v. Bukowski, supra*, at 1105.) This Court held in *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368, 375 (1970), that the reasonable doubt standard of proof is a due-process requirement. Therefore, "[A] strong argument from history and policy might well be made that some form of the corroboration rule should be considered binding as an element of 'due process' of law." (*United States v. Bukowski, supra*, at 1106, n. 7.)

In the present case the record contains evidence against petitioner that is independent of his extrajudicial admissions. However, that evidence was consistent with petitioner's innocence. In addition, we have no way of knowing whether the trial court accepted any of that evidence or whether petitioner was convicted on the basis of his admissions without supporting corroborative evidence. When an erroneous procedure is employed, this Court has refused to speculate as to the result that might have occurred if the proper procedure had been followed. Reversal is required so that the correct standards can be applied. (See *Jackson v. Denno*, 378 U.S. 368, 391-2, 84 S. Ct. 1774, 1789-9, 12 L. Ed. 2d 908, 924-5 (1964) [reversal necessary to assure trial court's application of proper standard for judging voluntariness of confession].)

This Court has never decided:

(1) Whether the corpus delicti rule applies to statements made to private citizens;

(2) Whether the rule is a due-process requirement.

These questions, and the question whether the corpus delicti rule was properly applied in this case, are significant issues deserving of this Court's consideration.

2. Admission Of Evidence Of Extrajudicial And In-Court Identifications Of Petitioner By The Witness Giamformaggio Deprived Petitioner Of Due Process Of Law.

The gas station operator Giamformaggio testified that in the latter part of 1968 a man, whom he identified as petitioner, asked him to honor credit cards by giving cash instead of goods and services. The man drove a red El Dorado. He allegedly told Giamformaggio that he had " 'taken' Master Charge for $30,000.00 plus." (R.T. 86-9.) At an unspecified later time, a former F.B.I. agent named Butts, then working for Texaco, showed Giamformaggio a group of eight pictures. The group contained two pictures of petitioner but only one of each of the other persons. Giamformaggio selected petitioner's pictures. (Ex. B; R.T. 102.) Giamformaggio did not think the others looked anything like petitioner. (R.T. 102.) Giamformaggio first testified that he did not and then that he did describe the man's appearance to Butts before being shown the pictures. (R.T. 100-01.)

The Deputy United States Attorney and a postal inspector showed the same group of pictures to Giamformaggio in April, 1972, before Giamformaggio testified. Again

the group contained two pictures of petitioner and Giamformaggio selected those two. (R.T. 98-100, 189.)

The evidence does not show how much time had passed since Giamformaggio had last seen petitioner. The government had the burden of proving all relevant circumstances surrounding the identification. Where a photo display is impermissibly suggestive, the prosecution must show by *clear and convincing* evidence that the in-court identification is based on a source independent of the photo display. (*United States v. Gambrill*, 449 F.2d 1148, 1153 (D.C. Cir. 1971).) In court, Giamformaggio identified petitioner. (R.T. 86.) The government was permitted to reopen its case for the purpose of having Giamformaggio state his conclusion that he would have been able to identify petitioner in court even if he had not twice previously been shown the eight pictures. (R.T. 184.) (See *United States v. Gambrill*, 449 F.2d 1148, 1153 (D.C. Cir. 1971); *United States v. Johnson*, 452 F.2d 1363, 1369 (D.C. Cir. 1971) [witness' conclusion that identification is independent does not conclusively supply necessary clear and convincing evidence to meet government's burden].)

The trial court received the evidence of Giamformaggio's identification of petitioner over petitioner's objection and motion to strike on the ground that the pictures were unduly suggestive of petitioner as the suspect and that the extrajudicial identification tainted the in-court identification. (R.T. 194.)

Postal Inspector Collier tried to explain why he included two pictures of petitioner in the group: "One, he had just been arrested and his hair was messed and he looked pretty disreputable. And the other one he is smiling and the hair

style is somewhat different." (R.T. 190.) This statement shows on its face that in preparing the group of pictures the *emphasis was on petitioner.* The inspector saw that petitioner's appearance was somewhat different in the two pictures and included both to achieve a complete presentation of the appearance of *petitioner,* but not of the others. If these pictures were shown to a person who had never seen any of the persons pictured, he would have little difficulty in concluding that the only man whose picture appeared twice was the suspect.

This Court in *Simmons v. United States,* 390 U.S. 377, 383-4, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247, 1253 (1968), held that there is an inherent danger of undue suggestion, leading to a due-process deprivation, where the police show a witness "the pictures of several persons among which the photograph of a single such individual *recurs or is in some way emphasized.*" (Emphasis added.) By emphasizing petitioner's pictures, the authorities "[i]n effect, . . . repeatedly said to the witness, 'This is the man'." (*Foster v. California,* 394 U. S. 440, 443, 89 S. Ct. 1127, 1129, 22 L. Ed. 2d 402, 407 (1969).)

The exhibition of two pictures of petitioner was unnecessary and inexcusable. It could only have been done to assure the identification of petitioner. The admission of this evidence by the trial court resulted in a significant constitutional violation that merits review by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to

review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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Appendix:

Opinion of the Court Below.

APPENDIX

OPINION OF THE COURT BELOW

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

No. 72-2130.

UNITED STATES OF AMERICA, Appellee, vs. JAMES LEE STOCKWELL, Appellant.

[November 22, 1972]

Appeal from the United States District Court for the Central District of California

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and SKOPIL, District Judge.*

PER CURIAM:

James Lee Stockwell appeals his conviction under 18 U.S.C. §§ 1341 and 1342 of 20 counts of mail fraud involving credit cards.

The assignments of error challenge an out-of-court identification, the receipt of evidence of incriminating statements by Stockwell, and the sufficiency of the evidence to sustain the convictions.

The challenged identification was made, initially from photographs, by a Texaco service station operator who said he could hardly forget a man who "drove up in a candy-apple-red Eldorado" and tried to obtain $300 in cash on his oil-company card by offering a kickback of $100 to the operator. The witness testified that he would have remembered the man

*The Honorable Otto R. Skopil, Jr., United States District Judge for the District of Oregon, sitting by designation.

without seeing the photographs. The government did not resort to improperly suggestive tactics in the identification procedure.

The assertion that the evidence was insufficient to prove the charges is frivolous, and the objection to Stockwell's out-of-court statements to government witnesses is equally without merit.

†

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on DECEMBER 18th, 1972, I served the within PETITION FOR WRIT OF CERTIORARI (STOCKWELL vs. UNITED STATES) on the following named parties by depositing THREE COPIES THEREOF, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follow:

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20543

UNITED STATES ATTORNEY
CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR, U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed at HUNTINGTON BEACH, CALIFORNIA, on 18th day of DECEMBER, 1972.

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-916

JAMES LEE STOCKWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial in the United States District Court for the Central District of California, in which petitioner waived his right to a jury, petitioner was convicted on twenty counts of mail fraud in violation of 18 U.S.C. 1341 and 1342. He was sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed (Pet. App.).

1. The evidence at trial established that petitioner defrauded various credit card companies with credit cards obtained under false names and with other false information.[1] Briefly, this evidence showed that in

[1] Petitioner admits that he was the person who applied for and used the credit cards (Pet. 8).

in Beverly Hills through which everything cleared and that he had already "taken Master Charge for $30,000 plus" (Tr. 89–90).

On cross-examination Giamformaggio testified that, between petitioner's second and third visit to his station, Texaco Security Agent Butts showed Giamformaggio a group of photographs after Giamformaggio had described petitioner to Butts (Tr. 95–96, 100–101). Giamformaggio picked out a photograph of petitioner as the man who had shown him the Texaco credit card bearing the name of James Casino (Tr. 103). In April 1971, after petitioner's arrest but prior to trial, an Assistant United States Attorney and Postal Inspector Collier showed Giamformaggio a number of photographs, including petitioner's (Tr. 99–100, 186, 190).[2]

Postal Inspector Collier testified that before he showed Giamformaggio the photographs, Giamformaggio had given him a physical description of petitioner tallying with the physical description Giamformaggio had given Texaco Agent Butts three years pre-

[2] The photographs that Texaco Agent Butts showed Giamformaggio were unavailable at trial (Tr. 108). The photographs Postal Inspector Collier showed Giamformaggio were marked for identification as Defense Exhibit B and were received in evidence on the court's own initiative (Tr. 184–185, 189–190). Contrary to petitioner's contention (Pet. 7, 13), the photographs were not received in evidence over petitioner's objection. Nor, contrary to petitioner's contention (Pet. 6), was the set of photographs shown Giamformaggio by Butts the same set shown him by Collier, since Collier's set included a photograph of petitioner taken shortly after petitioner's arrest in April 1971, whereas Butts had shown Giamformaggio the set of photographs in 1968 (Tr. 100, 170, 190).

viously (Tr. 190). Collier had included two photographs of petitioner in the display because in one photograph petitioner "had just been arrested and his hair was messed and he looked pretty disreputable," whereas in the second photograph petitioner "is smiling and the hair style is somewhat different" (Tr. 190). When he displayed the eight photographs to Giamformaggio, Collier did not suggest which photograph Giamformaggio should pick out (Tr. 190).

Giamformaggio positively identified petitioner at trial and testified that he would have been able to identify petitioner even if no photographs had been shown him (Tr. 86, 106–107, 184). The trial judge, in denying petitioner's motion to strike all of Giamformaggio's trial testimony as tainted by Collier's photographic display, commented after examining the photographs (Tr. 196–197):

> The objection that we usually find in a case of this kind is that we have * * * the allegation, at least, is that the pictures are of people who are so different that there is only one person that comes anywhere near to being the same, and naturally you would have to pick that one.
>
> * * * That is not the case here.
>
> These pictures are of people who really are quite comparable in appearance. I think his ability to recognize him from these pictures indicates that he has a rather good memory of the appearance of the defendant and his testimony will tend to support this same thing.
>
> It may be a very odd proposition, you might say, being made according to the testimony. I doubt very much if service station operators are

> approached regularly to charge $300 on a credit card, with the assurance that they will get a $100 rebate * * *.
>
> So I can see very well why a person would remember someone who would do that.

2. Petitioner contends that the pre-trial photographic display shown by Postal Inspector Collier was impermissibly suggestive because the display contained two photographs of petitioner. But as the court below held, the inclusion of these two, dissimilar phototographs of petitioner in a display of eight photographs shown to Giamformaggio did not "give rise to a very substantial likelihood of irreparable misidentification" (*Simmons* v. *United States*, 390 U.S. 377, 384) when considered in light of "the totality of the circumstances." *Stovall* v. *Denno*, 388 U.S. 293, 302. Here, numerous witnesses, including friends and business associates of petitioner, identified petitioner as the person who obtained and used a credit card under the names of James Casino, which was the name on the credit card shown to Giamformaggio by the person with whom Giamformaggio conversed on three occasions. Hence, the trial court, after examining Collier's photographic display, properly rejected petitioner's motion that these two photographs in a spread with six other similar photographs rendered inadmissible Giamformaggio's in-court identification. See *United States* v. *Smith*, 452 F. 2d 638 (C.A. 4), certiorari denied, 406 U.S. 910. Moreover, as the trial court noted (Tr. 196–197), the unusual nature of petitioner's offer to Giamformaggio supports Giamformaggio's testimony (Tr. 184) that he would have

identified petitioner in court even if no photographs had been shown him.[3] This is an area where "great weight must be given to the determination of the judge who saw and heard the witness," *United States ex rel. Phipps* v. *Follette*, 428 F. 2d 912, 915 (C.A. 2), and the court of appeals properly affirmed the district court's judgment in this regard. See also *Clemons* v. *United States*, 408 F. 2d 1230, 1252 (C.A. D.C.).

With respect to the photographs shown by Texaco Agent Butts to Giamformaggio, petitioner's third visit to the service station, when Giamformaggio told petitioner that Texaco had a file on him, occurred after Butts had displayed the photographs and shows that the witness did not rely on his photographic identification when he identified petitioner in court.[4]

3. Petitioner contends that his conviction impermissibly rests on uncorroborated extrajudicial admissions. But statements made in furtherance of a scheme are not equivalent to admissions made to the police after the crime has been completed. And even apart from these statements, the evidence recited above

[3] There is no need to defer consideration of this petition until after this Court's decision in *United States* v. *Ash*, No. 71-1255, since petitioner has never raised the issue of deprivation of counsel during the photographic display, which is the issue involved in *Ash*.

[4] In any event, Butts was not a government agent. Butts' photographic display, the content of which was never revealed at trial (Tr. 195), was different from that of Inspector Collier. Butts' display, which apparently contained only one photograph of petitioner, was shown to Giamformaggio in 1968, whereas Collier's display included a 1970 photograph (Tr. 100, 170, 190).

clearly showed petitioner's involvement in the fraudulent scheme.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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